No. 11,533

United States Circuit Court of Appeals

For the Ninth Circuit

STEPHEN SORRENTINO, also known as VINCENT SORRENTINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the Northern District of California, Southern Division

---

BRIEF FOR APPELLANT

WALTER H. DUANE,
790 Mills Building,
San Francisco,
Attorney for Appellant.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

Subject Index

	Page
Jurisdictional Statement	1
Statement of Facts	3
Specification of the Assigned Errors Relied Upon	6
Argument	9
I. The Court below erred in refusing to allow appellant to propound questions relating to the informer and Jerome Berry	9
II. The proof at the trial below established only one offense, if any, and the Court below consequently erred in sentencing appellant twice	17
Conclusion	25

Table of Authorities Cited

Pages

CASES

Bryant v. Skillman Hardware Co., 76 N.J.L. 45, 69A. 23 16

Claason v. United States, 142 U.S. 146, 12 S.Ct. 170, 36 L.Ed. 966 24
Commonwealth v. Congdon, 265 Mass. 166, 165 N.E. 467 14
Copperthwaite v. United States, 37 F.(2d) 846 ..... 18, 20
Coy v. Johnston, 136 F.(2d) 818 24

Dimenza v. Johnston, 130 F.(2d) 465 ..... 19, 24

Holbrook v. Hunter, 149 F.(2d) 230 22
Holbrook v. United States, 136 F.(2d) 649 24
Holiday v. United States, 130 F.(2d) 988 24

Lange, Ex parte, 85 U.S. 163, 21 L.Ed. 872 18

McInes v. United States, 62 F.(2d) 180 12
Michener v. Johnston, 141 F.(2d) 171 19
Miller v. United States, 300 Fed. 529 21
Miller v. United States, 147 F.(2d) 372 24
Morgan v. United States, 294 Fed. 82 22

Nielson, Re, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 23

Parmagini v. United States, 42 F.(2d) 721 21

Reynolds v. United States, 280 Fed. 1 22
Roosman v. United States, 280 Fed. 950 23

Schroeder v. United States, 7 F.(2d) 60 ..... 18, 22
Smith v. United States, 9 F.(2d) 386 13

Thomas, Ex parte, 55 F. Supp. 30 19

Wilson v. United States, 59 F.(2d) 390 13
Wilson v. United States, 145 F.(2d) 734 24
Woods v. United States, 26 F.(2d) 63 ..... 18, 22

FEDERAL STATUTES

Bank Robbery Act, 12 U.S.C.A. 588b 24
Harrison Narcotic Act, 26 U.S.C. 2553 and 2557. ..... 1, 17
Jones-Miller Act, 21 U.S.C. 174 ..... 1, 2, 17

MISCELLANEOUS

Wigmore on Evidence, 3rd ed., sec. 2374 ..... 13, 14

No. 11,533

United States Circuit Court of Appeals

For the Ninth Circuit

STEPHEN SORRENTINO, also known as VINCENT SORRENTINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the Northern District of California, Southern Division

---

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Stephen Sorrentino, was indicted for violating the provisions of the Harrison Narcotic Act, 26 U.S.C. 2553 and 2557, and the Jones-Miller Act, 21 U.S.C. 174 (R. 2-3). The indictment was in two counts, the first charging that appellant, contrary to the Harrison Narcotic Act, sold opium "not in or from the original

stamped package," and the second charged appellant with fraudulently and knowingly concealing and facilitating the concealment of the lot of opium described in the first count, contrary to the provisions of the Jones-Miller Act (R. 2-3).

Appellant pleaded "not guilty" to the indictment (R. 4-5), and after a trial by jury, was convicted on both counts (R. 132). After denial of his motions for a new trial and in arrest of judgment (R. 130-131), he was sentenced to a term of five years in a Federal prison on count one of the indictment and to a term of ten years under count two, and to pay a fine of $1,000.00, the sentences on the two counts to run concurrently (R. 132).

The District Court had jurisdiction of this action by virtue of provisions of 28 U.S.C.A. sec. 41, subd. 2, which provides that the District Courts shall have original jurisdiction "of all crimes and offenses cognizable under the authority of the United States," and by virtue of the following Amendment—Six—to the Constitution of the United States:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

This Court has jurisdiction to review the judgment by virtue of 28 U.S.C.A. sec. 225, which provides: "The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions,—First in the District Court, in all cases save where a direct review of the decision may be had in the Supreme Court, under section 345 of this Title."

The pleadings on which jurisdiction is based are the Indictment (R. 2-3) and the Plea of not guilty (R. 4-5).

STATEMENT OF FACTS

The principal witness against appellant was a Government agent by the name of Jacob Lieberman, a man who had been convicted in 1931 for violating the Federal narcotic laws (R. 55). The alleged acts out of which the conviction arose occurred not between appellant and Lieberman, however, but between appellant and another man known to the Record interchangeably as "the informer" and Jerome Berry. The Government achieved this unusual result by having Lieberman observe what transpired between appellant and the informer and by then relying principally on Lieberman for testimony as to the transactions between the other two. This device was the source of the principal issue at the trial below. Appellant sought to establish, by cross-examining Lieberman and another Government witness—not "the informer"—that the can of opium here in question was produced by the informer, a drug addict (R. 62, 76), from his own private stock and that the can was not delivered to him by appellant as the prosecution alleged (R. 32-33, 41, 68-69). The Government objected to those questions, and the Court below sustained the objections, on the ground that the questions tended to reveal the identity of the informer and the Government was privileged to keep the informer's identity a secret. The respective contentions of the parties are dealt with more fully below.

Lieberman testified as follows: That he first met appellant about August 8, 1945 (R. 58, 60) and met with him and the informer a number of times on the succeeding days

(R. 59, 60). These meetings occurred in the room of one Jim Berry in the Uptown Hotel, Fillmore Street, San Francisco, or in the adjoining and connecting room of Lieberman (R. 59-60). At one of these meetings, on the 14th of August, the informer asked appellant to sell him a can of opium (R. 75). Appellant replied that he did not have it but would get it for the informer (R. 75-76). He promised to bring the can to the hotel the next evening around 11:00 o'clock (R. 76-77).

The following evening appellant appeared at the Uptown Hotel and met Lieberman in the hotel lobby (R. 65). Lieberman then called Berry, who was in his room, on the phone (R. 65-66). Berry and appellant then went down to the basement of the hotel and there they had a conversation which was overheard by a Government agent who had hidden himself in the basement earlier in the evening (R. 24). The conversation that ensued between appellant and the informer was described by the hidden agent as follows: "I heard the informer say, 'Did you bring the can of mud?' And the defendant said, 'No, I didn't bring it; I will later on tonight or tomorrow.' The informer then removed a roll of currency from his pocket and asked the defendant if he wanted the money then, and the defendant said, 'No, you can pay me at the time I deliver the stuff.' Shortly thereafter the defendant left the room * * *" (R. 25).

The informer and appellant then went to Berry's and Lieberman's rooms in the hotel (R. 66-67) where the informer requested appellant to bring a can of opium to 1678 Forty-fifth Avenue at 5:00 P.M. the following day (R. 52).

About 4:45 on the next afternoon, Lieberman and the informer met Grady, the Government agent who had hidden in the basement of the Uptown Hotel the previous evening, at Forty-seventh Avenue and Morago Street, a short distance from the place where the informer and appellant had agreed to meet (R. 54). The three men proceeded to Fortieth Avenue and Irving Street where Grady searched the informer and Lieberman and gave the informer a bundle of money (R. 55). The informer and Lieberman then went to a house at 1678 Forty-fifth Avenue, to which the informer had a key (R. 68). About 5:00 P.M. appellant appeared and delivered a can of opium to the informer and received some money from the informer (R. 53). Appellant departed (R. 54), and though appellant's departure from the house was observed by Agent Grady (R. 26-27), no effort was made to apprehend appellant and to search him for the money purportedly transferred to him by the informer.

Appellant, on the other hand, while admitting frequent conversations with the informer and Lieberman (R. 106), denied that he had ever discussed or smoked opium with Lieberman or with Berry as Lieberman had testified (R. 106). He further testified that he went to the house on Forty-fifth Avenue on the 16th of August but that he went there only to recover an expensive camera the informer had borrowed from a friend of his (R. 109).

The defense showed also that the Government had been after appellant for a number of years in an attempt to pin some crime on him (R. 44, 81, 83-87, 89, 93, 96, 110, 111, 120). Appellant's home was visited and searched by Government agents three separate times between 1941 and

1945 (R. 81-87) and on one of these visits appellant was physically abused by one of the searching agents (R. 81, 87, 89). Nothing incriminating was found on any of these visits (R. 91).

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON

1. That the Court erred in sustaining objections to questions propounded on cross-examination relating to one Jerome Berry.

2. That the Court erred in sustaining objections to questions propounded on cross-examination relating to the informer.

3. That appellant was twice put in jeopardy for the same offense.

Points one and two are based upon the following portions of the Record:

Record 31-33:

Mr. Duane. Q. Who is the Government informer?

Mr. Davis: I object to that, your Honor, on the ground that we are not either privileged to or required to disclose the identity of the man.

The Court: Sustained.

Mr. Duane: Q. Tell me, is it your own Jerome Berry, also known as Jimmy Berry?

Mr. Davis: I object to that question on the same ground.

The Court: Sustained. The Government has the right to keep the identity of the witness undisclosed.

Mr. Duane: Q. Do you know a man by the name of Jerome Berry, also known as Jimmy Berry?

A. Yes.

Q. You do. Was he residing in that hotel, the Uptown Hotel, on the 15th day of August, 1945?

Mr. Davis: I make the same objection again, your Honor. It is an indirect way of trying to disclose the identity of the informer.

Mr. Duane: Not at all, your Honor. I will say to your Honor that we have a subpena out for Mr. Berry. Mr. Berry would be a very material witness in this case with reference to many matters. I want this jury to get the whole story.

The Court: Well, I will sustain the objection because you have already asked the question which calls for information that may not be disclosed. The Government is entitled to have it kept secret.

Mr. Duane: Well, I won't ask about the informer. Let me put this question.

Q. Was there a man by the name of Jerome Berry, an employee of that hotel—

Mr. Davis: I will make the same objection, your Honor. Counsel has already asked if Berry was the informer. That question has been objected to and stricken out. As to all the other questions, they are based on the same assumption.

The Court: The Court has to be guided by your questions. It would be a travesty upon justice if the Court allowed the examination to be pursued after you have named the man and asked the witness whether or not he is the informer. I will sustain the objection to any question along that line.

Record 41:

Q. You knew who occupied the house at that time?

A. Yes.

Q. And that was this informer that you speak of?

Mr. Davis: I object to that, your Honor. It is another means of identifying the informer.

Mr. Duane: I am not identifying the informer. It is a question I think I am entitled to an answer on.

The Court: I will sustain the objection. It is an indirect way of disclosing information which the law provided should be kept secret.

Record 68-69:

Q. Then what happened after that?

A. Well, we then went to 1678 Forty-fifth Avenue.

Q. Did anyone else let you in there?

A. The informer had a key.

Q. The informer had a key?

A. He opened up the door. We walked in.

Q. It was his home, wasn't it?

Mr. Davis: I will object to that.

The Witness: I don't know whose home it was.

The Court: Read the question, please.

(The question was read by the reporter.)

Mr. Davis: I objected to the question.

The Court: Sustain the objection on the ground the Government is entitled to keep secret the information concerning the informer. The Court has a duty not to allow such information to be disclosed. I think you should not pursue that, Mr. Duane, even indirectly, because it is improper.

Mr. Duane: I just want to say to your Honor this: It curtails the cross-examination to this extent, it is my purpose to show that at the time that that house was entered there was in that house cans of opium similar to this.

The Court: Well, you are not prevented from introducing any evidence that you wish to, but I don't see that the questions that you are asking have to do with that subject.

Mr. Duane: Only to this extent, if the Court please, I want to establish that it was the property of this so-called informer contained in his house.

ARGUMENT

I.

THE COURT BELOW ERRED IN REFUSING TO ALLOW APPELLANT TO PROPOUND QUESTIONS RELATING TO THE INFORMER AND JEROME BERRY.

Stripped of all embellishments, the Government's case against appellant rests on Lieberman's testimony that appellant, on August 16, 1945, at 1678 Forty-fifth Avenue, San Francisco, California, delivered and sold a can of opium to the informer. Appellant, on the other hand, categorically denied that he had delivered or sold any opium to the informer and insisted that though he visited the house in question at the time mentioned, he did so to recover a valuable camera that a friend of his had loaned to the informer (R. 109). The only issue before the jury, therefore, was whether appellant delivered the can of opium to the informer as the Government charged, or whether, as appellant contended and was attempting to

establish (R. 69), the can of opium came from the informer's own stock of the drug maintained in his own home at 1678 Forty-fifth Avenue.

To establish his case, appellant necessarily had to depend on cross-examining the Government witnesses. Obviously, he was not in a position, and could not reasonably be expected to be in a position, to show that, prior to his appearance at the house, he searched the informer's house and had found the can in question there. Until he was informed of the charge against him, there was no way or reason for him to have anticipated even the need for such a search. And, of course, it was impossible for him thereafter to show, other than by cross-examination, that the can had been in the informer's house before five o'clock on the 16th of August, when he met with the informer.

A careful analysis of the Record will show that this contention of appellant was not an idle one; for even in spite of the rulings of the Court against him appellant was within a short distance of proving his case. Appellant had shown that the Government inspectors were out to get him. For about four years preceding the events covered by this case, he had been closely watched and observed by the police. He was made a subject of inquiry among his friends and relatives (R. 93-96) and his home was searched on three separate occasions during this period (R. 81), each time without yielding any evidence of crime (R. 82, 89-90). On one of these occasions the dislike of one of the Government's agents for him resulted in his being struck in the face for no apparent cause (R. 92, 118). Other facts surrounding this case are equally signifi-

cant. The principal witness against appellant (Lieberman) was a convicted felon (R. 55) who was dignified for the purposes of this case with the title, "special employee of the Bureau of Narcotics" (R. 48), and his partner in detection (the informer, Berry) was a dope addict (R. 62, 76) whom the Government thought best not to call as a witness.

But of even greater significance to appellant's case are the omissions from duty and the testimony of Agent Grady. Although the character and reputation of the informer and Lieberman were well known to Grady, no effort whatever was made to determine whether or not they were framing appellant. Grady admitted (R. 42) that he had heard opium was being smoked in the informer's rooms but made no investigation to ascertain whether there was any truth in what he heard (R. 42). He admitted also (R. 41) that he knew who occupied the house at 1678 Forty-fifth Avenue (and we will show below that on the Record the house belonged to the informer). And yet, despite these facts, no search was made of the informer's house prior to appellant's visit to discover whether the informer had any opium of his own there, although it was very likely that he did. True, Grady did search Lieberman and the informer for narcotics before they left him to meet with appellant (R. 68), but that was an idle and empty gesture. Certainly, there was no purpose to searching them if they immediately were to be allowed to enter the informer's own home where it was likely he had a supply of opium. But perhaps even more illuminating is the failure of the Government to perform the simplest of all acts necessary

to prove appellant's guilt without question. Although Grady "saw the defendant leave the residence, enter his car, and drive away" (R. 27), presumably with the money, no attempt was made, as is the usual custom in such cases, to apprehend him and search him for the money!

Even without the opportunity to cross-examine the Government witnesses regarding the informer, therefore, appellant came within an ace of proving his case. If he had been allowed to cross-examine, as was his right, he probably could have proved his case in full; and certainly it must be conceded that by the Court's refusing him his right to cross-examine he was materially harmed and perhaps denied the only means by which he could have established his innocence.

The question then before this Court is, can there exist any court-made rule of law so flagrant as to deny to a defendant in a criminal case the only means by which he can establish his innocence, as the Court below ruled there was in this case? The question answers itself, and on logic alone, without any reference to cases or authorities, the answer must follow that the Court below erred.

It is not surprising, therefore, that the cases and authorities also are squarely opposed to the ruling of the Court below. The Court below applied automatically to this case the rule that the Government is privileged to withhold all information regarding an informer because "To inform is a statutory duty, and sound public policy forbids exposing informers to possible, even probable, evil consequences." *McInes v. United States,* 62 F.(2d) 180, 181 (C.C.A. 9). *BUT,* "There is * * * an exception to this rule or a modification of this general doctrine, in that

it gives way to another doctrine of the law when the two conflict. *A trial court must dispose of the cause before it. If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled.* [Citation of cases omitted.]" *Wilson v. United States,* 59 F.(2d) 390, 392 (C.C.A. 3). Emphasis supplied. Wigmore states the same exception to the rule as follows: "Even where the privilege is strictly applicable, the *trial Court may compel disclosure,* if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony." 8 *Wigmore on Evidence* (3rd ed.) sec. 2374. See also, the decision of this Court in *Smith v. United States,* 9 F.(2d) 386, where this Court sustained a ruling that a federal prohibition agent need not reveal the source of information leading to an arrest, but only after it found that "The testimony sought would have had no tendency to prove either the guilt or innocence of defendants" (at 387). Since the evidence sought to be uncovered by appellant in cross-examining regarding the informer's identity was indispensable to a showing of innocence, the case falls squarely within the exception to the rule and the Court below consequently erred in sustaining the objections to the questions.

There is yet another reason why the Court below erred in refusing to allow appellant to propound questions on cross-examination relating to the informer's identity. As was pointed out above, the rule forbidding such examination was developed to protect informers from possible reprisals and thus to encourage citizens to bring to the attention of the proper authorities crimes that are about

to be or are being committed. But in the case at bar appellant, long before the trial, knew well enough who the informer was; and since the rule "does not apply when the informer is known" (*Commonwealth v. Congdon,* 265 Mass. 166, 175, 165 N.E. 467, 470 (1928)), the rule has no application to the case at bar. As stated by Wigmore, 8 *Wigmore on Evidence* (3rd ed.) 2374, "If the identity of the informer is *admitted or known,* then there is no reason for pretending concealment, and the privilege of secrecy would be merely an artificial obstacle to proof."

Furthermore, the whole question was an academic one from the beginning; for the Record plainly shows in a number of ways that Berry was the informer. The Court, therefore, should have allowed appellant to pursue his inquiries unimpeded by a rule that no longer had any meaning in this case. That Berry was the informer can be established quickly and readily by comparing page 49 of the Record with pages 65 and 66. On direct examination, Lieberman testified as follows:

> "He (appellant) asked me where is the informer, *you know, by his name,* and I told him, 'I will call him, he is upstairs in his room.' I went to the phone. I called him down. * * *" (R. 49).

On cross-examination, he testified regarding the same incident as follows:

> "Well, when he came in around eleven o'clock at night he asked me if *Berry* was there. I told him, '*Berry* is not here right now, but he is up in his room. Do you want me to call him? I will call him.' I went to the phone and I called him." (R. 65-66) (Emphasis supplied)

It is clear from the Record, also, that the house at 1678 Forty-fifth Avenue belonged to the informer. At page 72 of the Record, Lieberman referred to the house as "his," i.e., the informer's house, and further testified that the informer had a key to it (R. 68).[1] And, of course, to accentuate the absurdity, appellant knew all along for whom he had asked when he arrived at the hotel that evening and with whom he had dealt throughout. And yet the Government tried to prolong the farce by pretending that it was trying to withhold the identity of the informer.

There is yet another facet of this question that deserves consideration. This case is wholly unlike the ordinary case where an informer is used by the Government to get evidence against a defendant. In the ordinary case, a person unknown to the defendant informs the police that a crime is being committed, or is about to be committed, and the police as a result of such information are able to detect the defendant in the commission of the criminal act and able to testify themselves to all elements necessary to constitute the crime. Here, however, the informer was a party to the very transaction that constituted the crime, and the Government could not, without the testimony of the informer, establish that a crime had been committed. Disregarding Lieberman for the moment, the prosecution could not have established its case without

---

1. Even assuming for the sake of argument that the Record does not clearly show that Berry was the informer and that the house belonged to him, the Court below nevertheless erred. If the informer and Berry are not the same person then there unquestionably was error in refusing to allow cross-examination regarding Berry since there is no rule of law whatsoever to prevent his identity from being revealed.

the informer. Clearly, if the informer himself had taken the stand to testify that apppellant had delivered and sold the can of opium to him, it would have been proper for appellant by cross-examination to show that the informer was a liar and that he had similar cans of opium on his premises. Can the Government, then, stand in a better position because it saw fit to send along with the informer a third person to observe all the transactions between the defendant and the informer and then have the observer, alone, take the stand? Plainly it cannot, for to allow the Government to hide material facts by this obvious device would allow it, by the mere expedient of sending a second agent to observe the first, to keep hidden forever the only facts upon which a defendant could establish his innocence.

The final straw is that Berry was not an informer at all. If anything, he was merely a special agent just as Lieberman was. He apparently was hired and paid by the Government as an officer for the special purpose of detecting appellant in the commission of a crime. The informers about which the cases speak, on the other hand, perform a different function; these people, instead of waiting for the Government to employ them to detect a crime, themselves inform the Government of the criminal act. The Government, therefore, gratuitously labeled Berry an informer; it made no showing or offer whatsoever that Berry was an informer within the meaning of the rule, and, indeed, no such showing can be made on the facts of this case, since Berry acted "by virtue of his office." *Bryant v. Skillman Hardware Co.*, 76 N.J.L. 45, 46, 69 A. 23, 24.

II.

THE PROOF AT THE TRIAL BELOW ESTABLISHED ONLY ONE OFFENSE, IF ANY, AND THE COURT BELOW CONSEQUENTLY ERRED IN SENTENCING APPELLANT TWICE.

The first count of the indictment charges appellant with unlawfully selling, dispensing and distributing "not in or from the original stamped package, a lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium," contrary to the provisions of the Harrison Narcotic Act, 26 U.S.C. 2553 and 2557 (R. 2). The pertinent provisions of that Act are as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; * * *"

The second count charges "That at the time and place mentioned in the first count * * * defendant fraudulently and knowingly did conceal and facilitate the concealment of said lot of smoking opium * * *," contrary to the Jones-Miller Act, 21 U.S.C. 174, which provides:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in,

knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

At the trial below, the Government relied for proof of its case on the statutory presumptions. It alleged only that immediately prior to the sale appellant had in his possession unstamped smoking opium. The two offenses, therefore, as the Court below properly pointed out, were predicated on "the same transaction and involve(d) the same can of opium" (R. 132). For that reason the Court ordered the sentences to run concurrently (R. 132). But the Court erred nevertheless; for by imposing sentence on each of the two counts it put appellant in jeopardy twice for the same offense, and the defect was not cured by having the two unequal sentences run concurrently.

The Constitutional principle that no one shall be put in jeopardy twice for the same offense "was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *Ex parte Lange,* 85 U.S. 163, 173, 21 L.Ed. 872, 878. And a criminal is twice punished for the same offense if the evidence necessary to prove either offense will necessarily establish the other also. *Schroeder v. United States,* 7 F.(2d) 60 (C.C.A. 2); *Copperthwaite v. United States,* 37 F.(2d) 846 (C.C.A. 6); *Woods v. United States,* 26 F.(2d)

63 (C.C.A. 8).[2] Applying this test to the case at bar it is at once apparent that we have here only one offense and not two. The indictment, itself, establishes that the second count occurred "at the time and place mentioned in the first count" and involved the same "lot of smoking opium" (R. 2-3); and the Court below pointed out that the two counts "arose out of the same transaction" (R. 132). And since the convictions were based on the statutory presumptions each of which was satisfied by a showing that defendant had in his possession the same can of opium, not one additional fact needed to be proved under the second count than was already shown under the first count. Indeed, *less* had to be shown under the second count than under the first. The presumption under the statute involved in the first count required a showing that defendant had the drug in his possession without "appropriate tax-paid stamps," while the presumption under the second count required a showing of "possession" alone. Necessarily, then, proof of the offense charged in count one established, without further proof, the offense charged in the second count. Imposition of

---

2. The test used in determining whether a defendant has been twice *tried* for the same offense is similar. "The test in determining whether more than one offense is charged in an indictment or denounced by statute is whether or not each proposed offense requires proof of some fact which the others do not." *Dimenza v. Johnston*, 130 F.(2d) 465, 466 (C.C.A. 9); cf. *Michener v. Johnston*, 141 F.(2d) 171, footnote 3 (C.C.A. 9). But it is not contended here that appellant was *tried* twice for the same offense. It is conceded that had the proof under the two counts varied sufficiently the indictment could have supported two separate sentences. *Ex parte Thomas*, 55 F. Supp. 30 (E. D. Ky.). But since the proof here did not vary, as shown in the text, the Government did not fullfill its burden of establishing separate offenses and appellant was twice sentenced for the same offense. It is this point only that we urge here.

sentence under both counts, therefore, constituted double punishment in violation of the provisions of the Fifth Amendment to the Constitution of the United States. *Copperthwaite v. United States,* 37 F.(2d) 846 (C.C.A. 6).

The *Copperthwaite* case is squarely in point. There, as here:

> "Appellants were convicted under both counts of an indictment, the first of which charged the purchase and sale of unstamped morphine in violation of the Harrison Anti-Narcotic Act (Sec. 692, Tit. 26, U.S. C.A.)[3], and the second of which charged, as of the same time and place, the buying and selling of the same amounts of morphine which they knew had been unlawfully imported into the United States, thus constituting an offense under the Narcotic Import Statute (Sec. 174, Tit. 21, U.S.C.A.). They were sentenced to five years imprisonment under the first count and ten years under the second count—the two terms to be concurrent" (at 847).

With respect to the question of double punishment, the Court said:

> "* * * The entire proof in this case consisted of evidence that the defendants agreed to furnish and sell morphine to a purchaser and thereafter did have it (unstamped) in their possession and deliver it to him. By virtue of the presumption declared in the Harrison Act, this possession tended to show the forbidden purchase; and the same possession also tended—by virtue of the presumption declared in the Import Act—to show unlawful importation and defendants' knowledge. *In such case the government may punish for either offense, but we think the sup-*

3. Now section 2553 of the same title.

porting evidence does not so materially vary as to justify two punishments, merely because two inferences are attached by different statutes to the same evidential basis.'' (At 847-848. Emphasis supplied.)[4]

The *Copperthwaite* case has abundant support in the many similar cases decided under the Federal Prohibition Law. See, for example, *Miller v. United States,* 300 Fed. 529 (C.C.A. 6), cert. denied 266 U.S. 624, in which defendant was indicted for and found guilty of, the unlawful possession and the unlawful sale of intoxicating liquor. He was sentenced on each count. ''The act of possession relied upon was merely that possession necessarily incidental to the sale which was the basis of the sale count (at 534).'' On the question whether defendant was twice punished for the same offense the Court said (at 534):

> ''* * * While there may be, and commonly is, possession without sale, so that possession for a substantial time, followed by a sale, might be two distinct offenses, in this case the only possession shown was that

4. Nothing in the opinion of this Court in *Parmagini v. United States,* 42 F.(2d) 721, is contrary to the decision in the *Copperthwaite* case, which the *Parmagini* case cites (at 724). The question presented there was whether concealment and sale could be distinct offenses although both occur in connection with a single transaction. Appellant concedes that they can and makes no contention that appellant was *tried* twice for the same offense. See footnote 2, *supra.* It is submitted, however, and the *Copperthwaite* case so holds, that once having gone to trial, the Government cannot rely on a single presumption to prove both parts of its case, and if it does, defendant cannot be sentenced twice. The choice of words in the opinion in the *Parmagini* case is significant. At 724-725, the Court stated clearly that it was considering offenses that ''occur *in connection with* a single transaction'' (emphasis supplied); the *Copperthwaite* case deals with the situation where both offenses arise out of the *same* transaction.

> which temporarily came to Miller for the purpose of completing by delivery the sale which he was making. The same testimony which showed the sale necessarily showed the only possession which is shown at all. It follows * * * that judgment upon the sale count would bar subsequent prosecution for this act of possession, and that there should not be separate and cumulative sentences. * * *''

Accord: *Schroeder v. United States,* 7 F.(2d) 60 (C.C.A. 2); *Woods v. United States,* 26 F.(2d) 63 (C.C.A. 8). Compare *Morgan v. United States,* 294 Fed. 82 (C.C.A. 4), holding that where conviction of a defendant on charge of manufacturing moonshine whisky (Count 3) necessarily embraced conviction of the offense of having in his possession the same moonshine whisky (Count 1) and the offense of having in his possession property designed for the manufacture of moonshine whisky (Count 2), conviction on Counts 1 and 2 must be set aside.

In the case at bar (in the language of the cases just cited), ''the same testimony which showed the sale necessarily showed the only possession which is shown at all.'' It follows that there was but one offense and that appellant was sentenced twice contrary to the provisions of the Constitution. Accordingly, the sentence under the second count must be set aside. *Holbrook v. Hunter,* 149 F.(2d) 230 (C.C.A. 10); *Morgan v. United States,* 294 Fed. 82 (C.C.A. 4); *Reynolds v. United States,* 280 Fed. 1 (C.C.A. 6); *Schroeder v. United States,* 7 F.(2d) 60 (C.C.A. 2).

This result, that the sentence under the second count must be set aside, can be based on either of two theories. In the *Holbrook* case, the Circuit Court of Appeals for

the Tenth Circuit, in considering this double-sentence problem, stated that "when the court imposed the sentence * * * on count one, it exhausted its power to sentence, and the sentence on count two was void" (at 232). In the other cases cited, however, the Courts disregarded the order in which the separate counts were set out and held that sentence was to be imposed on the count whose proof included proof of all the other counts. For example, in the *Morgan* case, *supra,* the Circuit Court of Appeals for the Fourth Circuit said (at 84):

> "Conviction of the defendant on the charge of manufacturing moonshine whisky, under the facts of this case, necessarily embraced conviction of the offense of having in possession the same moonshine whisky, and the offense of having in possession property designed for the manufacture of moonshine whisky, charged in counts 1 and 2 of the same indictment. The act charged as a crime in count 3 included acts charged as crimes in counts 1 and 2. It follows that the sentence under counts 1 and 2 must be set aside, as was properly conceded by the United States attorney. Nothing can be added to the discussions and decisions in Re Nielson, 131 U.S. 176, 185, 9 Sup. Ct. 672, 33 L. Ed. 118, Reynolds v. United States (C.C.A.) 280 Fed. 1, and Rossman v. United States (C.C.A.) 280 Fed. 950."

Under either of these two theories the sentence in this case must be reduced to a prison term of five years. Under the theory of the *Holbrook* case, the sentence of ten years on the second count is void; under the theory of the other cases, since proof of sale of opium by appellant under count one automatically proved possession under count two but proof of possession under count two would not

have proved the sale under count one, the sentence under count two must be set aside.[5]

---

5. It is interesting to note that in the *Copperthwaite* case, *supra,* where similar sentences were imposed, the Court sustained the longer sentence under the second count. It did so, however, without examination of the problem and without citation of any authority whatever, though similar problems had been previously considered, as was shown in the text. If conjecture be allowed, it is possible that the Court confused the problem here with the general rule, not applicable here, that "in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be revised on error, if any one of the counts is good and warrants the judgment." *Claasen v. United States,* 142 U.S. 146, 12 S.Ct. 170, 35 L.Ed. 966.

The Bank Robbery Act (12 U.S.C.A. sec. 588b) has given rise to many cases involving the problem regarding which of two sentences for the same offense shall be enforced. The cases under that Act are hardly consistent with each other and can furnish support to any view. As stated by the Circuit Court of Appeals for the Second Circuit, the cases "deal in a variety of ways with a variety of sentences." *Miller v. United States,* 147 F.(2d) 372, 374. See, for example, *Holbrook v. United States,* 136 (F.(2d) 649 (C.C.A. 8)), *Holiday v. United States,* 130 F.(2d) 988 (C.C. A. 8), *Coy v. Johnston,* 136 F.(2d) 818 (C.C.A. 9) and *Wilson v. United States,* 145 F.(2d) 734 (C.C.A. 9). In any event, they are not applicable to our problem here. Those decisions apply to a special case—a statute whose terms set out two separate offenses in form only and not in substance (*Dimenza v. Johnston,* 130 F.(2d) 465 (C.C.A. 9))—and do not apply to a case such as we have here, where two distinct offenses have been set out in the indictment.

CONCLUSION

The District Court erred in refusing to allow appellant to show that the informer was Jerome Berry, that Berry was an opium addict, that the house at 1678 Forty-fifth Avenue belonged to Berry, and all other facts relevant to a showing that the can of opium alleged to have been delivered by appellant to Berry was in fact taken by Berry from his own home and not delivered to him by appellant. The judgment of the Court below, therefore, should be reversed and the case remanded for a new trial.

If this Court should find that the trial below was without reversible error, then the District Court erred in imposing sentence on count two of the indictment, and the judgment of the Court below should be modified by striking the judgment on the second count.

Dated: June 20, 1947.

Respectfully submitted,

WALTER H. DUANE,
790 Mills Building,
San Francisco,
Attorney for Appellant.